(7)

No. 93-714

In The

Supreme Court of the United States

October Term, 1993

U.S. BANCORP MORTGAGE COMPANY,

Petitioner,

v.

BONNER MALL PARTNERSHIP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF CHARLES W. ADAMS IN SUPPORT OF NEITHER PARTY

CHARLES W. ADAMS
Professor of Law
The University of Tulsa College of Law
3120 East Fourth Place
Tulsa, OK 74104
(918) 631-2437

Amicus Curiae

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Letters from the parties consenting to the filing of this amicus curiae brief have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

I am not representing a client, and the views expressed in this brief are my own. I have no monetary interest in this or any other bankruptcy case. Aside from wishing to assist the Court, my interests in this case are entirely academic. I am a Professor of Law at The University of Tulsa College of Law, where I have taught courses in creditors' rights and bankruptcy. I am the author of *An Economic Justification for Corporate Reorganizations*, 20 Hofstra L. Rev. 117 (1991). I had completed a forthcoming article dealing with capital contributions in Chapter 11 reorganizations when the Court granted *certiorari* in this case.

SUMMARY OF ARGUMENT

This brief supports the Respondent's position that the Court should recognize a new capital exception to the absolute priority rule. However, it is opposed to the Respondent's plan of reorganization because the plan does not appear to provide an adequate equity cushion in the debtor's capital structure following reorganization. Consequently, this brief is aligned with neither party.

The purpose of a Chapter 11 reorganization is to repair an insolvent company's dysfunctional capital structure. It should not matter whether the new capital

that an insolvent company needs for a successful reorganization comes from its creditors, outside investors, or its former owners. What is critical to the reorganization is the substance (i.e., the form and amount) of the new capital contribution, rather than its source. In addition to recognizing the new capital exception, the Court should clarify the size of the capital contribution that is required.

The prevailing standard from *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 121-22 (1939), is unworkable. While superficially plausible, the *Los Angeles Lumber* standard turns out on closer analysis to be merely a tautology. It should be replaced by a standard requiring an investment of sufficient new capital that the reorganized company will have a capital structure solid enough to withstand future adversity without failing again. This standard derives from the "feasibility requirement" in 11 U.S.C. § 1129(a)(11). Section 1129(a)(11) prescribes that a bankruptcy court shall confirm a reorganization plan only if it "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor."

ARGUMENT

I. The Purpose of Chapter 11

A bankruptcy reorganization is a process for restoring financial health to an insolvent business through an adjustment of its capital structure. Generally, the adjustment involves the discharge of some debt and the infusion of new capital from either outside investors, the company's creditors, or its owners.

A business normally is financed partly through equity and partly through debt. Some equity is essential in a company's capital structure to capture the residual interest in its future earnings. Most companies also have substantial levels of debt financing. Besides offering a tax benefit, debt in a company's capital structure provides leverage to owners, enabling them to earn a higher expected return, though at greater risk.

Excessive debt, however, produces a risk of default and a possible conflict of interest between the company's owners and its creditors. A conflict of interest may arise because the owners are entitled to the profits if the business succeeds, while the maximum return for the creditors is the stated rate of interest. In a company where most of the capital structure is debt with its owners having only a small amount of equity invested, the owners will have an incentive for excessive risk-taking. The owners have everything to gain if a risky venture succeeds, and nothing but their limited equity to lose if it fails. The creditors, on the other hand, will continue to earn only their fixed interest payments if the venture is successful, while they risk nonpayment of the loan principal if it fails.

The risk of default and the potential conflict of interest associated with a leveraged capital structure are normally held in check by the maintenance of a suitable equity cushion. An equity cushion represents the owners' stake in the enterprise, and the presence of a substantial equity cushion insures that most of the risk is borne by the owners, rather than the creditors.

An insolvent company has a pathological capital structure. Because liabilities already exceed asset value, an insolvent company's owners have nothing more to lose from further operating losses. Rather than maximizing the expected return from operations, the owners' primary concern will be to have the business earn a sufficient return so that it can become solvent again. Because owners of an insolvent company bear none of the downside risk, they will favor risky ventures with the potential for large gains over others with more predictable, but smaller, gains. Until the business achieves solvency, moderate gains will benefit only the creditors and not the owners.

Unfortunately, both the creditors and owners of an insolvent business lack incentives for maximizing its long term interests. Insolvency generates destructive conflicts of interests between the company's owners and creditors, with the owners seeking to have the business take excessive risks and the creditors trying to collect as much on their claims as they can through seizure of the company's assets. A company cannot operate effectively until these conflicts are resolved. It is the resolution of these conflicts through the restoration of a sound capital structure that is the fundamental purpose of the bankruptcy reorganization process. Charles W. Adams, *An Economic Justification for Corporate Reorganizations*, 20 Hofstra L. Rev. 117, 117-38, 157-58 (1991).

II. The Source of the Capital Contribution

There are only three potential sources of capital for an equity cushion in a reorganized company: the company's creditors, outside investors, and its existing owners.

First, the company's creditors may provide the necessary capital through a conversion of some of their debt into equity. A satisfactory capital structure can be restored by discharging part of the debt (the portion above the company's going concern value) converting some debt to equity to create an equity cushion, and allowing the remainder to continue as debt in the reorganized company. A major disadvantage of this approach to reorganization is that it may not be feasible for some creditors to become equity owners of the reorganized business. Banks, for example, are a major source of debt financing, and the Glass-Steagall Act, 12 U.S.C. § 24 (Seventh), imposes significant restrictions on their ownership of common stock. *See* Regulation Y, 12 C.F.R. § 225.22(c)(1)(i) (bank holding companies may hold voting securities that are acquired in the ordinary course of collecting a debt if they are divested within two years of acquisition); Frederick K. Beutel & Milton R. Schroeder, *Bank Officer's Handbook of Commercial Banking Law* §§ 4-30, 5-30 (5th ed. 1982).

Outside investors are an alternative source of new capital for the equity cushion. Again, the portion of the debt above the company's going concern value will have to be discharged with the remainder continuing as debt in the reorganized company. In return for their new capital contributions, the outside investors receive ownership of the reorganized company, and their ownership interests constitute the equity cushion. A major disadvantage to this approach is that it may be difficult to find outside investors willing to contribute capital to an insolvent company.

A significant disadvantage to obtaining equity cushion capital from either creditors or outside investors is that these approaches offer no benefit to the existing owners of the insolvent company, who lose control in the reorganized company. In many cases, the existing owners may be familiar with the business operations and have been involved in managing the company; thus, the reorganized company may be disadvantaged by the loss of their association with it.

A more serious problem with these approaches is that they offer the owners no reason to initiate the reorganization process. If the company's owners have no incentive to file a reorganization proceeding, they will be inclined to seek delay and to take increasingly risky gambles hoping that solvency will be restored eventually through some miracle. This is likely to lead to further financial deterioration, to the point where recovery is no longer possible. In theory, the insolvent company's creditors can file involuntary Chapter 11 proceedings if the owners fail to do so. But in practice, creditors do not have ready access to the company's financial information, and initiating an involuntary proceeding is difficult and risky for them. *See* Douglas G. Baird, *The Initiation Problem in Bankruptcy*, 11 Int'l Rev. L. & Econ. 223 (1991).

An additional justification for allowing participation by the former owners in the reorganized company is that they may be the best source of new capital. *See Northern Pacific Railway v. Boyd*, 228 U.S. 482, 495 (1913). Unless the owners are allowed to provide new capital for the reorganizing company, the reorganization may fail and the creditors could wind up receiving less in liquidation than they would have under the plan. If the absolute priority

rule bars contributions of new capital from an insolvent company's owners, it could be detrimental to the interests of the very unsecured creditors it was designed to protect.

Contributions of new capital from an insolvent company's former owners should be encouraged, rather than barred. Accordingly, this Court should recognize the new capital exception to the absolute priority rule. At the same time, the Court should require the form and amount of the capital contributions to be sufficient to fulfill the purpose of the Chapter 11 reorganization process by restoring financial health to the reorganized company.

III. The Form of the Capital Contribution

In *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), this Court addressed the form required for a capital contribution if the new capital exception were to be recognized. Following *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 121-22 (1939), the Court held that capital contributions would have to be in the form of "money or money's worth."

The reorganization plan in *Los Angeles Lumber* called for contributions from the reorganizing corporation's former shareholders that consisted merely of their "financial standing and influence in the community" and their providing "continuity of management." *Id.* at 122. The Court held that these intangibles were not adequate consideration for the issuance of stock in the reorganized corporation, saying: "On the facts of this case they cannot possibly be translated into money's worth reasonably

equivalent to the participation accorded the old stockholders. They have no place in the asset column of the balance sheet of the new company. They reflect merely vague hopes or possibilities." *Id.* at 122-23 (footnote omitted).

The reorganization plan in *Ahlers* called for "yearly contributions of labor, experience, and expertise," 485 U.S. at 201, from the owners of a farm. As in *Los Angeles Lumber*, the Court decided that these contributions of future services were not sufficient to justify an exception from the absolute priority rule. It reasoned:

> Viewed from the time of approval of the plan, respondents' promise of future services is intangible, inalienable, and in all likelihood, unenforceable. It "has no place in the asset column of the balance sheet of the new [entity]." *Los Angeles Lumber*, 308 U.S., at 122-23. Unlike "money or money's worth," a promise of future services cannot be exchanged in any market for something of value to the creditors *today*. In fact, no decision of this Court or any Court of Appeals, other than the decision below, has ever found a promise to contribute future labor, management, or expertise sufficient to qualify for the *Los Angeles Lumber* exception to the absolute priority rule.

Id. at 204 (emphasis in original) (footnote omitted).

In *Kham & Nate's Shoes No. 2, Inc. v. First Bank*, 908 F.2d 1351, 1362-63 (7th Cir. 1990), the Seventh Circuit confronted a type of capital contribution similar to one offered in the reorganization plan in this case: a shareholder guarantee of a loan to the reorganizing corporation. The plan of reorganization provided for the

corporation's former shareholders to retain ownership of the corporation in return for their guaranteeing new loans that would finance the reorganization. *Id.* at 1354.

Relying on *Ahlers* and *Los Angeles Lumber*, the Seventh Circuit ruled that the guarantees could not constitute new value for purposes of satisfying a new capital exception to the absolute priority rule. Judge Easterbrook's opinion for the court pointed out that guarantees are not balance-sheet assets; instead, guarantees are intangible, inalienable, and unenforceable, because there is no way for a corporation to prevent shareholders from revoking their guarantees or rendering them valueless by disposing of their assets. The court also noted that persons organizing a new corporation in Illinois could not issue stock to themselves in return for guarantees of loans, because Illinois law restricts the consideration for new shares to money, property, or past services. *Id.* at 1362.

The Seventh Circuit made a useful comparison in the *Kham & Nate's Shoes* decision between on the one hand, the problem of the form of new capital contributions in the corporate reorganization context, and on the other, the problem of "watered stock" and the form of capital contributions required as consideration for the issuance of stock under general corporate law. For many decades, the trend in corporate law has been in the direction of increasing liberalization of the form of allowed capital contributions. 1 Model Business Corp. Act Ann. § 6.21 history (3d ed. 1989); 1 Model Business Corp. Act Ann. § 19 comment (2d ed. 1971). The Model Business Corporation Act (2d ed. 1971) provided:

> The consideration for the issuance of shares may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor or services performed for the corporation. . . .
>
> Neither promissory notes nor future services shall constitute payment or part payment for the issuance of shares of a corporation.

1 Model Business Corp. Act Ann. § 19 (2d ed. 1971).

The Revised Model Business Corporation Act (3d ed. 1989) broadens the allowable consideration to "any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation." 1 Model Business Corp. Act Ann. § 6.21 (3d ed. 1989). The Official Comment to Section 6.21 explains:

> Section 6.21(b) specifically validates contracts for future services (including promoters' services), promissory notes, or "any tangible or intangible property or benefit to the corporation," as consideration for the present issue of shares. . . . In the realities of commercial life, there is sometimes a need for the issuance of shares for contract rights or such intangible property or benefits. And, as a matter of business economics, contracts for future services, promissory notes, and intangible property or benefits often have value that is as real as the value of tangible property or past services, the only types of property that many older statutes permit as consideration for shares.

Whether intangible property should be a permissible form for a new capital contribution in a bankruptcy reorganization should depend on the applicable state corporate law. *See Butner v. United States*, 440 U.S. 48, 55 (1979) (in the absence of an overriding federal interest, property rights in bankruptcy proceedings should be determined by reference to state law). Thus, if the applicable state law would permit a promise of future services (as in *Ahlers*) or a shareholder guarantee (as in *Kham & Nate's Shoes* or this case) to constitute allowable consideration for the issuance of stock in a corporation, then these forms of intangible property should be permissible as capital contributions, whether they come from a former shareholder or an outside investor. Most states (including Idaho), however, continue to follow Section 19 of the Model Business Corporation Act (2d ed. 1971) and prohibit the issuance of shares in exchange for such forms of intangible property. *See* 1 Model Business Corp. Act Ann. § 6.21 annot. at 370-71 (3d ed. 1989) (listing states).

IV. The Amount of the Capital Contribution

The prevailing standard for the amount of the new capital contribution in a plan of reorganization comes from the following dictum in *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 122 (1939): "[T]he stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder." Because the shareholders' contribution in that case was not "in money or in money's worth," it was not in the proper form, and the Court did not decide whether it was "reasonably equivalent" to the value of the equity the shareholders were to receive under the plan. Thus, the

Court's statement concerning the amount of the new capital contribution was not part of the holding.

Although this standard appears reasonable, it provides no real guidance to courts, because it is a tautology. *See* Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 96-101 (1991). Under the absolute priority rule, all of an insolvent company's value must be allocated to its creditors; any debt in excess of its value as a going concern is discharged. When new capital is contributed, the *Los Angeles Lumber* dictum will be satisfied as a matter of course, because the only value not allocated to the creditors is the new capital contribution. As Professor Markell notes, rather than placing any limits on the new capital exception to the absolute priority rule, the *Los Angeles Lumber* standard "merely rephrases the . . . rule." *Id.* at 101.

In order to repair an insolvent company's capital structure in the course of the reorganization process, its liabilities must first be written down to the going concern value of the assets. At that point, the going concern value of the company's assets net of its liabilities is zero. The going concern value of the company's assets net of liabilities may not be greater than zero, because if it were, the creditors would be entitled to the excess as a result of the absolute priority rule. A contribution of new capital to the reorganizing company causes its going concern value net of its liabilities to increase precisely by the amount of the contribution. Since the contribution will always be equivalent to the resulting going concern value net of liabilities, the amount of the capital contribution that is required in the reorganization process cannot be determined from the company's going concern value.

The indeterminacy of the *Los Angeles Lumber* standard may be demonstrated with a numerical example. Consider the balance sheet of a company that initially has assets with a going concern value of $1 million and liabilities of $3 million. Writing down the liabilities to $1 million (the going concern value of the assets) would yield a net going concern value of zero. If an owner or other investor were to make a capital contribution of as little as $5,000 after the writing down of the liabilities, the going concern value of the company's assets after the contribution would be $1,005,000 and its net going concern value would be $5,000. This is illustrated below.

Before Reorganization

Assets	$1,000,000	Liabilities	$3,000,000
		Equity	-2,000,000
Total	$1,000,000		$1,000,000

After Reorganization

Assets	$1,000,000	Liabilities	$1,000,000
Shareholder Contribution	5,000	Equity	5,000
Total	$1,005,000		$1,005,000

An owner's contribution of new capital does not vanish when it is made; instead, it increases the going concern value of the reorganized company. The increase in going concern value resulting from the infusion of new capital may be even larger than the amount of the new capital contribution, and over time, the participation of former owners may contribute to the company's going

concern value, particularly if they are involved in the company's management or operations.

Since the *Los Angeles Lumber* standard is fundamentally unsound, it should be replaced with a better standard that is consistent with the purpose of the Chapter 11 reorganization process. The most appropriate criterion for the size of the new capital contribution is that it should be sufficient to provide an adequate equity cushion. The price that the new owners of a reorganized business should be required to pay for control following the reorganization is neither the going concern value (which will initially be zero if the company's assets are valued correctly and the absolute priority rule is applied) nor the amount of liabilities that are to be discharged. Instead, the price should be that the new owners must put up a sufficient stake in the enterprise to absorb any future losses that can reasonably be anticipated, thus reducing the risks to the creditors.

Absolute protection for a company's creditors is not attainable. No business is entirely risk free, and there is always some possibility of future losses to creditors that cannot be eliminated with any finite amount of equity capital. Although creditors cannot expect to receive absolute protection, they can be shielded from most risk of loss through the maintenance of an adequate cushion of equity. An adequate cushion of equity means the company's owners will have appropriate incentives to maximize the long term value of the company, whether the equity cushion comes from outside investors or from former owners. The equity cushion ought to be large enough, not only to keep the potential conflicts of interest between owners and creditors to a minimum, but also to absorb any fluctuations in earnings that can reasonably

be anticipated. Otherwise, there is too great a risk of another insolvency, and the reorganization will have been for naught.

To protect the company's existing and future creditors from a second insolvency, the "feasibility requirement" in section 1129(a)(11) of the Bankruptcy Code provides that a bankruptcy court should confirm a reorganization plan only if confirmation "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor." This requirement has long been a part of the law of bankruptcy reorganizations. To determine whether a plan satisfies the feasibility requirement, the courts normally look at whether there is a reasonable prospect for the reorganization plan to be successful. While the adequacy of a debtor's capital structure is often listed as one of the factors used in analyzing a plan's feasibility, the bankruptcy courts have tended to concentrate more on the accuracy of the plan's income projections than on the need for the owners of the reorganized company to have a significant stake in the enterprise.

The feasibility requirement cannot be satisfied if the reorganized business is so thinly capitalized that it is unable to withstand some future losses. The largest possible equity cushion would be provided by an all-equity capital structure, but most companies operate satisfactorily with substantial levels of debt. The presence of debt increases risk, but the reorganized company obtains offsetting benefits from the tax advantages and leverage that debt financing provides. And subject always to the stability of the expected earnings for the reorganized company, the risk of insolvency following reorganization can be

held to an acceptable level by maintaining an adequate equity cushion.

A variety of factors may potentially influence a company's capital structure. These include the company's profitability, the uniqueness of its products, the degree of specialization of its equipment and its employees, and the extent of equity ownership by its management. *See* Milton Harris & Artur Raviv, *The Theory of Capital Structure*, 46 J. Fin. 297, 337-40 (1991) (summarizing theoretical and empirical studies on the effect of these and other factors on a corporation's capital structure). However, the primary factor affecting a company's capital structure is generally the volatility of its earnings. A number of studies have shown, for example, that corporations in regulated industries, which tend to have stable earnings, have the highest proportions of debt, while pharmaceutical and electronics manufacturers, which tend to have volatile earnings, have the smallest proportions of debt. *Id.* at 333-35. Therefore, the capital structures of other companies in the same industry may provide a gauge for a bankruptcy court to use in evaluating the adequacy of a proposed equity cushion in a reorganization plan. *Cf.* Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 Cornell L. Rev. 597, 607-09 (1993) (companies emerging from reorganizations tend to have higher debt-to-equity ratios than companies of comparable size in the same businesses).

Although there may not be any precise formula for determining an ideal capital structure for a reorganized company, in many cases a bankruptcy court can be reasonably certain that a capital structure proposed in a plan under review is inadequate. For example, it is clear that a

business should not be allowed to emerge from the reorganization process without any equity cushion. For closer cases, the bankruptcy court may need expert testimony from a financial analyst concerning the adequacy of capitalization and possibly also from a lender as to the likelihood of the debtor being able to borrow the debt provided for in the plan from an informed outside source. *See In re Mobile Steel Co.*, 563 F.2d 692, 703 (5th Cir. 1977) (listing methods for determining the adequacy of capitalization in equitable subordination cases).

The adequacy of the capital contribution proposed in this case is addressed below.

V. Application to the Facts of This Case

In this case the debtor's primary asset is a shopping mall in Idaho, which the bankruptcy court valued at $3.2 million. Its major liability is a loan of $6.6 million secured by a deed of trust against the mall. The debtor's plan provides for repayment of the secured portion of the loan ($3.2 million) 32 months after confirmation with interest payable monthly in the interim. Unsecured creditors with claims greater than $1,000 will receive a *pro rata* distribution of 300,000 shares of preferred stock, which has a par value of $1.00 per share and is convertible to a maximum of 300,000 shares of common stock upon repayment of the secured portion of the loan. The preferred shares will have a liquidation preference over the common stock. The debtor's six former partners together are to contribute cash of $200,000 and will receive 2 million shares of common stock in return. In addition, the plan calls for the partners to subsidize any shortfall in working capital during the first 32 months after confirmation of the plan

and for five of the former partners to contribute a collateral trust mortgage on other property as a guarantee of the debts that are being assumed by the reorganized business. *See In re Bonner Mall Partnership*, 2 F.3d 899, 905 (9th Cir. 1993).

It is apparent that the reorganized corporation would be too thinly capitalized to satisfy the feasibility requirement. Even though the reorganized corporation would not be immediately insolvent if the plan were confirmed, the common shareholder's equity interest would be "under water" on account of the issuance of the 300,000 shares of $1.00 par value preferred stock to the corporation's former unsecured creditors. The issuance of the preferred shares would therefore violate the stated capital requirements of applicable Idaho law. *See* Idaho Code §§ 30-1-18, 30-1-21 (1980) (prohibiting the issuance of shares for less than their par value). With only a $200,000 equity cushion, the common shareholders would not be entitled to any profits until the $100,000 impairment of capital resulting from issuance of the preferred stock was cured. Consequently there is a potential conflict of interest between the common and preferred shareholders built into the capital structure of the reorganized corporation.

The *Bonner Mall* plan is also deficient on account of the size of the equity cushion. There are a number of factors that affect the size of a real estate loan, but most lenders require at least a 75% loan to value ratio:

> Since the beginning of the commercial mortgage business, lenders have imposed a 75% loan-to-value limit as being prudent. This real estate recession has unfortunately shown that even that level of leverage was too aggressive. As a result, a number of survey members are now requiring that their commercial mortgages meet a 65% loan-to-value test or less.

John B. Levy, *Regulations Prompt Higher Minimum Spreads*, 35 Nat'l Real Estate Investor 24 (Mar. 1993). *Cf.* 79 Fed. Reserve Bull. A37 (Sep. 1993) (loan-to-value ratios for mortgages on new homes ranged from 74.8% to 79.5% between 1990 and June, 1993). An appropriate equity cushion for the secured creditor's $3.2 million claim might therefore be in the neighborhood of $1 million, instead of the $200,000 called for in the reorganization plan.

The plan also calls for the former partners to subsidize any shortfall in working capital and to guarantee the payment of the reorganized corporations with a collateral trust mortgage. Depending on the circumstances, these guarantees might have sufficient value to compensate for the lack of a more substantial cash contribution. However, they would not be allowed as consideration for the issuance of new shares under applicable Idaho law. *See* Idaho Const. art. XI, § 9 ("No corporation shall issue stocks or bonds, except for labor done, services performed, or money or property actually received; and all fictitious increase of stock shall be void."); Idaho Code § 30-1-19 ("The consideration for the issuance of shares may be paid, in whole or in part, in cash, in other property, tangible or intangible, or in labor or services actually performed for the corporation."). Thus, they should not be considered part of the equity cushion of this reorganized corporation.

Accordingly, the reorganization plan does not satisfy the feasibility standard and should not be confirmed.

Even if this Court concludes that the record is not sufficiently clear to decide on confirmation of the reorganization plan, the Court should specify the standard clearly enough for the lower courts to apply. The standard should be based on the capital structure of the reorganized company having an equity cushion that is adequate to withstand reasonably foreseeable variations in future earnings. The adequacy of the equity cushion may be determined by comparison to the capital structures of similar businesses and from testimony of financial experts.

CONCLUSION

Inseparable from the issue of whether a new capital exception to the absolute priority rule should exist is the question of what its parameters should be. In addition to recognizing this exception, this Court should enunciate reasonable standards for the form and amount of the new capital required for confirmation of a reorganization plan.

Respectfully submitted,

Charles W. Adams
Professor of Law
The University of Tulsa College of Law
3120 East Fourth Place
Tulsa, OK 74104
(918) 631-2437

Amicus Curiae